

OCT 31 1977

MICHAEL RODAK, JR., CLERK

In The
Supreme Court of the United States

October Term, 1977

No. 77-523

GWENDY WILSON, Administratrix of the Estate of
Gary Wilson, Deceased, and Gwendy Wilson, Individually
and as Widow of Gary Wilson, Deceased,

Petitioner,

vs.

CROUSE-HINDS COMPANY,

Respondent.

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

WILLIAM J. BRENNAN, JR.
DAVID S. HOUGHTON
FITZGERALD, BROWN, LEAHY, STROM,
SCHORR & BARMETTLER

1000 Woodmen Tower
Omaha, Nebraska 68102
(402) 342-5550

Attorneys for Respondent

TABLE OF CONTENTS

	Pages
Statutory and Rule Provisions	1
Statement of the Case	2
Argument	3
Conclusion	10

CASES CITED

Cone v. Beneficial Standard Life Insurance Company, 388 F. 2d 456 (8th Cir. 1968)	8
Fulton v. Chicago, Rock Island & Pacific Railroad Co., 481 F. 2d 326, 338-39 (8th Cir), <i>cert. denied</i> , 414 U. S. 1040 (1973)	8
George W. B. Bryson & Co., Ltd. v. Norton Lilly & Co., Inc., 502 F. 2d 1045 (5th Cir. 1974)	9
Lamoreux v. San Diego Ariz. Eastern Ry., 311 P. 2d 1 (Cal. 1957)	5
N. L. R. B. v. Local No. 42, et al., 476 F. 2d 275 (3rd Cir. 1973)	9
United States v. Marines, 535 F. 2d 552 (10th Cir. 1976)	9
Western Pacific R. Corp. v. Western Pacific R. Co., 345 U. S. 247 (1953)	6

STATUTE CITED

28 U. S. C. § 46 (c)	1, 6, 7, 10, 11
----------------------------	-----------------

RULES CITED

	Pages
Fed. R. App. P. 34 (b)	2, 8
Fed. R. App. P. 35	6, 7, 8, 10, 11
Fed. R. Civ. P. 15 (a)	3, 4, 5, 10
Fed. R. Civ. P. 41 (a)	3, 4, 5, 10
Fed. R. Civ. P. 51	3, 8, 9

In The
Supreme Court of the United States

October Term, 1977

No. 77-523

GWENDY WILSON, Administratrix of the Estate of
Gary Wilson, Deceased, and Gwendy Wilson, Individually
and as Widow of Gary Wilson, Deceased,

Petitioner,

vs.

CROUSE-HINDS COMPANY,

Respondent.

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

STATUTORY AND RULE PROVISIONS

28 U. S. C. § 46 (c):

“Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service. A circuit judge of the circuit who has retired from regular active service shall also be

competent to sit as a judge of the court in banc in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof."

Fed. R. App. P. 34 (b):

"Time Allowed for Argument. Unless otherwise provided by rule for all cases or for classes of cases, each side will be allowed 30 minutes for argument. If counsel is of the opinion that additional time is necessary for the adequate presentation of his argument, he may request such additional time as he deems necessary. Requests may be made by letter addressed to the clerk reasonably in advance of the date fixed for the argument and shall be liberally granted if cause therefor is shown. A party is not obliged to use all of the time allowed, and the court may terminate the argument whenever in its judgment further argument is unnecessary."

STATEMENT OF THE CASE

This action was brought by Gwendy Wilson, widow of Gary Wilson and administratrix of his estate, as a diversity action in the United States District Court for the Southern District of Iowa for the wrongful death of Gary Wilson, who was fatally electrocuted on March 10, 1973 when attempting to move a portable welder at his place of work. Plaintiff's theory of Defendant's liability was that the electrical plug manufactured by the Defendant was defectively designed in that it failed to prevent the ground wire from coming into contact with the phase wire when placed under torsional stress, thus causing the frame of the welder to become electrically charged. A jury verdict was rendered in favor of Defendant, Crouse-Hinds,

and Plaintiff appealed to the United States Court of Appeals for the Eighth Circuit.

The Court of Appeals for the Eighth Circuit originally issued an opinion on April 19, 1977, in which the Court specifically rejected all of the Plaintiff's assignments of error on appeal except the assertion that the trial court improperly instructed the jury in Instruction No. 11. On Defendant's petition for rehearing and suggestion for rehearing en banc, the Court of Appeals, en banc, held that Plaintiff had failed to preserve the alleged error in Instruction No. 11 since she had not specifically objected to the Court's language in accordance with Fed. R. Civ. P. 51.

ARGUMENT

Since Plaintiff did not comply with either Rule 15 (a) or Rule 41 (a), no conflict among the circuits or conflict with applicable decisions of this Court exists for review.

Plaintiff attempted to unilaterally dismiss her negligence and implied warranty claims against Defendant sometime during the second day of trial by filing a written pleading with the Clerk of the Federal Court. Defendant received a copy of this pleading on the third day of trial. The record does not show when the Court was apprised of the attempt. The record is also devoid of any discussion between Plaintiff's counsel and Defendant's counsel or with the Court about the attempted dismissal. As the Eighth Circuit noted, the trial court was apparently made aware of the dismissal sometime before instructing the jury.

On appeal, the Plaintiff claimed that, over her objection, the trial court had improperly admitted evidence of faulty maintenance of the electrical plug manufactured by Defendant. Plaintiff contended that this conduct was evidence of the decedent's contributory negligence or the negligence of decedent's employer and was inadmissible under applicable state law.

This evidentiary claim by the Plaintiff raised the issue of whether or not the Plaintiff's attempt to voluntarily dismiss the negligence and implied warranty counts was effective. In considering this point, the Eighth Circuit correctly noted that error, if any, was predicated upon Plaintiff's effective withdrawal of the implied warranty and negligence counts of Plaintiff's cause of action. Therefore, the Court clearly had the issue of effectiveness of the attempted unilateral dismissal of those counts before it.

The Court found that Plaintiff had not complied with either Fed. R. Civ. P. 15 (a) or 41 (a) in dismissing less than all the claims involved in the action. Noting that some disagreement existed regarding whether to follow Fed. R. Civ. P. 15 (a) or Rule 41 (a) in dismissing less than all the claims, the Court held that determining which rule was applicable was immaterial since Plaintiff failed to comply with either rule.

The holding of the Eighth Circuit Court of Appeals is sound. It is based on a correct interpretation and application of the rules. In any proceeding, either Rule 41 (a) or Rule 15 (a) (whichever is applicable) requires that before a dismissal of any part of a cause of action during trial can be effected, the Court's approval must be

obtained or the Plaintiff must have the written consent of the Defendant. Therefore, as the Eighth Circuit noted, it does not matter which rule applies, since Plaintiff complied with neither rule.

Plaintiff attacks the Eighth Circuit's holding on the ground that neither rule is applicable in this situation. Plaintiff argues that Rule 41 (a) is not applicable. However, Plaintiff concludes, without meaningful analysis, that Rule 15 (a) is equally not applicable. Rule 15 (a) applies to "amendments" and that term, as applied to pleadings, is defined as the correction of some error or mistake in a pleading already before the Court. Amendments under Rule 15 (a) are not limited to additions to the pleadings, as Plaintiff implies, rather, the rule applies to any change, whether it be an alteration, an addition, or a deletion to that which has been previously pleaded. See *Lamoreux v. San Diego Ariz. Eastern Ry.*, 311 P. 2d 1 (Cal. 1957).

The Eighth Circuit was ultimately correct in its holding that regardless of whether Rule 41 (a) or Rule 15 (a) applies, one of them is clearly applicable to this situation and neither was complied with by Plaintiff.

Plaintiff has failed to cite one case since the adoption of the Federal Rules of Civil Procedure which supports her claim that the procedure she followed in attempting to dismiss her negligence and warranty claims was in compliance with those rules. Under these circumstances, this case does not merit review in this Court.

Exercise of this Court's power of supervision is not required in this case since the Court of Appeals acted within the scope of discretion vested in it when it amended the panel opinion to conform with prior Circuit Court rulings.

After the panel issued its opinion on April 19, 1977, Defendant petitioned for a rehearing, with a suggestion for a rehearing en banc, in accordance with the Fed. R. App. P. 35. Rule 35 was promulgated in response to the Supreme Court's holding in *Western Pacific R. Corp. v. Western Pacific R. Co.*, 345 U. S. 247 (1953). There, this Court noted that statutory authority for en banc hearings was founded in 28 U. S. C. § 46 (c). Section 46 (c) states:

"Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service. A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge of the court in banc in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof."

The Supreme Court held in *Western Pacific Railway Corp.* that Section 46 (c):

"* * * vests in the court the power to order hearings in banc. It goes no further. * * * The court is left free to devise its own administrative machinery to provide the means whereby a majority may order such a hearing."

345 U. S. at 250.

The Court further noted that:

"[I]t [is] quite clear that the draftsmen [of Section 46 (c)] intended to grant the en banc power and no more; the court itself was to establish the procedure for exercise of the power."

* * *

"Because § 46 (c) is a grant of power, and nothing more, each Court of Appeals is vested with wide latitude of discretion to decide for itself just how that power shall be exercised." (Emphasis ours.)

345 U. S. at 257-58.

Thus, the en banc procedure is discretionary with each Court of Appeals and it is respectfully submitted that the Eighth Circuit's grant of a rehearing en banc in this case was well within the scope of discretion vested in it by Rule 35 and 28 U. S. C. § 46 (c).

Since the Court of Appeals en banc was appropriately convened under 28 U. S. C. § 46 (c) and Rule 35 of the Federal Rules of Appellate Procedure, the Court of Appeals had the power to do that which any three-judge panel could do, including modification of an opinion. This is precisely what the full Circuit Court decided to do. In this regard, it is important to note that the Court consisted of two members of the original three-judge panel, Judges Lay and Webster. (District Court Judge Regan, who was sitting by designation on the original panel, of course, could not participate in the en banc procedure.) It is also important to note that Judge Lay, author of the original panel opinion, also authored the en banc opinion, reversing the panel opinion's decision with respect to the viability of Instruction No. 11. Judge Webster concurred in the en banc opinion written by Judge Lay.

Furthermore, it is clear that the reason for the rehearing en banc was in full accord with Rule 35 (a), Subsection 1:

“when consideration by the full court is necessary to secure or maintain uniformity of its decisions * * *”

The panel opinion had failed to take appropriate note of the specific objection requirement of Fed. R. Civ. P. 51. Thus, the panel's opinion was not in accord with prior Eighth Circuit opinions which required compliance with Rule 51. In *Fulton v. Chicago, Rock Island & Pacific Railroad Co.*, 481 F. 2d 326, 338-39 (8th Cir.), cert. denied, 414 U. S. 1040 (1973), the Eighth Circuit stated the correct application of Rule 51 as requiring specific objections to a requested instruction in order to preserve the question for appeal. See also *Cone v. Beneficial Standard Life Insurance Company*, 388 F. 2d 456 (8th Cir. 1968). The effect of the en banc court's opinion was to bring the instant case in line with the law of the circuit regarding the application of Rule 51 as noted in the above cited cases.

It is furthermore clear that the Court of Appeals may dispense with oral argument on rehearing en banc without violating the applicable Federal Rules of Appellate Procedure or due process. Rule 34 of the Federal Rules of Appellate Procedure provides in Subsection (b):

“(b) *Time Allowed for Argument.* Unless otherwise provided by rule for all cases or for classes of cases, each side will be allowed 30 minutes for argument. If counsel is of the opinion that additional time is necessary for the adequate presentation of his argument, he may request such additional time as he deems necessary. Request may be made by letter

addressed to the clerk reasonably in advance of the date fixed for the argument and shall be liberally granted if cause therefor is shown. A party is not obliged to use all of the time allowed, and the court may terminate the argument whenever in its judgment further argument is unnecessary.”

In construing this language in *N. L. R. B. v. Local No. 42, et al.*, 476 F. 2d 275 (3rd Cir. 1973), the Third Circuit Court of Appeals held that the above quoted language did not explicitly or implicitly mandate oral argument. The Third Circuit reasoned:

“Such a rigid requirement would be incompatible with the need of the judiciary to husband its time by limiting argument to those cases in which the court believes it will aid in the quality of the decision-making process. Rather, we hold the rule merely establishes certain procedures in the event oral argument is granted.”

476 F. 2d at 276.

See also *United States v. Marines*, 535 F. 2d 552 (10th Cir. 1976); *George W. B. Bryson & Co., Ltd. v. Norton Lilly & Co., Inc.*, 502 F. 2d 1045 (5th Cir. 1974).

Moreover, in this case, Plaintiff had a full oral argument before the three-judge panel. On petition for rehearing, the full Court of Appeals had the benefit of briefs of both counsel, the appendix, briefs in support of and in opposition to Defendant's petition for rehearing, and the full transcript of the District Court proceedings. The ultimate issue decided by the full court on rehearing was not unique and not a difficult legal issue. The question was simply whether Plaintiff had made the specific objections to Instruction No. 11 as required by Fed. R. Civ. P. 51.

This is exactly the kind of case in which further oral argument would have been an inefficient use of judicial time and energy.

The Court of Appeals acted within the scope of discretion granted it by 28 U. S. C. § 46 (c) when it considered the Defendant's petition for rehearing en banc and that the exercise of its authority in amending the panel opinion was to maintain uniformity with the law of the circuit. The Eighth Circuit has not departed from the accepted and usual course of judicial proceedings, and, therefore, the supervision of this Court is not required in this case. In fact, the Circuit Court's actions in this case vindicated the very purposes of 28 U. S. C. § 46 (c) and Fed. R. App. P. 35.

CONCLUSION

It is respectfully submitted that the Court should deny the petition for writ of certiorari for the reason that there is no conflict between the circuits on the question of whether the Federal Rules of Civil Procedure apply to a litigant's attempt to unilaterally dismiss a claim or count during trial without complying with either Rule 15 (a) or Rule 41 (a). Moreover, the ruling of the Court of Appeals is not in conflict with any applicable holding of this Court.

It is further respectfully submitted that the Court should deny the petition for writ of certiorari because the lower Court's action in considering this case en banc subsequent to the panel decision is well within the exercise

of the authority and discretion vested in it by 28 U. S. C. 46 (c) and Fed. R. App. P. 35. The Court of Appeals has, therefore, undertaken no action which has departed from the accepted and usual course of judicial proceedings which requires this Court to exercise its power of supervision.

Respectfully submitted,

WILLIAM J. BRENNAN, JR.

DAVID S. HOUGHTON

FITZGERALD, BROWN, LEAHY, STROM,
SCHORR & BARMETTLER

1000 Woodmen Tower
Omaha, Nebraska 68102
(402) 342-5550

Attorneys for Respondent